

No. 78-484

SEP 21 1978

MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH M. O'CALLAGHAN

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

JOSEPH M. O'CALLAGHAN,
pro se
127 North Dearborn Street
Suite 919
Chicago, Illinois 60602
(312) 332-1600

INDEX

	PAGE
Opinions and Orders Below	1
Jurisdiction of the Court	2
Questions Presented	2
Constitution, Statutes and Regulations	2
Statement of Facts	4
Jurisdiction of Court of Claims	5
Argument	6
A. Reasons for Granting Writ	6
B. Error to Apply Laches Where No Showing of Prejudice	6
C. Error to Uphold Physical Evaluation Board Determination Where Not Supported by the Record ..	9
Conclusion	10
Appendix A—Opinion of the Court of Claims	App. 1
Appendix B—Order denying plaintiff's motion for rehearing and for rehearing en banc	App. 6
Appendix C—Order denying plaintiff's motion to strike	App. 7

AUTHORITIES CITED

Cases

	PAGE
Abraham v. Ordway, 158 U.S. 416 (1895)	7
Northern Pacific Railway Company v. Boyd, 228 U.S. 482 (1913)	7

Other Authorities

Fifth Amendment to U. S. Constitution	8, 10
Rule 37(b), Rules of Court of Claims	7

**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

NO.

JOSEPH M. O'CALLAGHAN

vs.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

Joseph M. O'Callaghan, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Claims, App. A., *infra*, is reported at Ct. Cl., No. 137-76, decided April 27, 1978. The order denying plaintiff's motion for rehearing and for rehearing en banc App. B., *infra*, was issued June 23, 1978, Ct. Cl., No. 137-76, order of June 23, 1978.

JURISDICTION OF THE COURT

The judgment of the Court of Claims was entered on April 27, 1978. Plaintiff's motion for rehearing was denied on June 23, 1978.

The Jurisdiction of this Court is invoked under 28 USC 1255 (1).

QUESTIONS PRESENTED

1. Did the Court err in applying the doctrine of laches to bar a veterans military disability retirement pay claim brought within the applicable statute of limitations where there was no evidence of any prejudice to the government caused by the delay?

2. Did the Court err in refusing to set aside an Army Physical Evaluation Board determination that plaintiff had certain physical defects existing prior to his entry on active service despite the Court's finding that such determination was not supported by the record before it?

CONSTITUTION, STATUTES AND REGULATIONS

Amendment V. United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 USC 2501 — STATUTE OF LIMITATIONS

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Army Regulation, AR635-40, paragraph 1-8.1—Physical Evaluation of Retention, Retirement, or Separation; Presumptions

a. In the absence of a preponderance of evidence to the contrary and as provided in b below, and paragraph 1-8.2, the following presumptions will apply to physical disability evaluation:

(1) A member is presumed to have been in sound physical and mental condition upon entering active service except to the extent as to physical disabilities noted and recorded at the time of entrance. Any disease or injury discovered after a member enters active service is presumed to be in line of duty while entitled to receive basic pay and not due to the members intentional misconduct or willful neglect.

* * * *

b. The foregoing presumptions may be overcome only by a preponderance of evidence as distinguished from personal opinion, speculation, or conjecture. When there is reasonable doubt concerning a member's condition, an attempt should be made to resolve the doubt on the basis of further clinical investigation and observation, and such other evidence as may be adduced. In the absence of such proof by a preponderance of evidence, reasonable doubt will be resolved in favor of the member. However, in the case of members with more than 3 years of service, any increase in the severity of a pre-existing disease or injury will be considered as evidence of service aggravation, provided that such increase in severity was not due to the member's intentional misconduct or willful neglect.

STATEMENT OF FACTS

Plaintiff served on active duty in the United States Army as a commissioned officer from September 1967 to April 1970. On February 17, 1970, plaintiff appeared before a Physical Evaluation Board which found him to be 40% disabled due to rheumatoid spondylitis, that the disability was incurred or aggravated while he was entitled to basic pay, in the line of duty or national emergency, that plaintiff was unfit for military service but that 20% of his disability existed prior to the time plaintiff entered active service.

These findings were approved by the Secretary of Army and plaintiff was discharged from the Army on April 2, 1970 with severance pay. Had the Physical Evaluation Board found plaintiff's disability existing prior to service to be 10% or less, plaintiff would have been entitled to disability retirement under 10 USC Section 1201.

Plaintiff immediately commenced a long series of correspondence with Department of Army in an effort to obtain his records of military service. These efforts were ultimately unsuccessful. In March of 1973 plaintiff applied to the Board for Correction of Military Records seeking to have the finding of disability existing prior to service removed and to be placed on disability retirement status. This application was denied in October, 1973. In March of 1976, 5 years, 11 months 27 days after plaintiff's claim accrued, he filed his petition in the United States Court of Claims. Plaintiff claimed that he was entitled to an increase in disability rating because of disability related to his rheumatoid spondylitis and his heart and further claimed that nothing in the record supported a finding by the Physical Evaluation Board of any degree of disability existing prior to plaintiff's entry on active duty. On cross motions for summary judgment, the Court of Claims held

that it could not decide the issues before it without a trial and that plaintiff's claim was barred from proceeding to trial because of the doctrine of laches.

JURISDICTION OF COURT OF CLAIMS

The jurisdiction of the Court of Claims was founded upon 28 USC 1491 and 10 USC 1201.

ARGUMENT

A.

REASONS FOR GRANTING WRIT

In this case, for the first time, the Court of Claims has adopted the position that the mere passage of time, unsupported by proof of any sort of prejudice, is sufficient to bar a claim brought within the applicable statute of limitations. This decision denies to plaintiff, and to others similarly situated, their right to due process under Article V of the United States Constitution. Since there is potentially a large number of military retirement pay claimants and since this rationale foreshortens the Congressionally established 6 year claim period without legal justification this decision warrants review by this Court.

B.

ERROR TO APPLY LACHES WHERE NO SHOWING OF PREJUDICE

The doctrine of laches is an equitable one whereby a court can refuse to permit a party to proceed with its claim where that party has unduly delayed proceeding and the other party has been prejudiced by the delay. Essentially the court must balance the injury of not allowing a party to proceed with his claim against the injury to the other party occasioned by the delay.

As early as 1895, this Court, through Mr. Justice Harlan held:

But it is now well settled that independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue

and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. *Abraham v. Ordway*, 158 U.S. 416, 420 (1895).

There is no question in the instant case but that plaintiff waited virtually to the end of the statutory six year claim period before proceeding with his claim. The mere passage of time, however, is not sufficient to bring laches into operation. This Court has held:

But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. *Northern Pacific Railway Company v. Boyd*, 228 U.S. 482, 562 (1913).

Thus it can be seen that the operative element of laches is prejudice resulting from the passage of time to the party seeking to assert laches. Under Rule 37 (b) of the Rules of the Court of Claims, laches is an affirmative defense which must be pleaded and proved by the party asserting it. In the case at bar, defendant had raised the issue in its Amended Answer wherein it merely alleged that "Plaintiff is barred from pursuing his claim by the equitable doctrine of laches." Plaintiff moved to strike this defense as insufficient and the trial judge, in denying plaintiff's motion, ruled "that the defense of laches depends on a number of elements which are to be balanced equitably. This may most properly be determined after a trial on the merits." Order of October 26, 1976. App. C. Thereafter, defendant moved for summary judgment on the record with no further supporting pleading of fact or any affidavits to support its assertion that the claim was in any way barred by laches or to sustain its burden of proof of prejudice resulting from the delay. As previously noted,

the Court of Claims granted defendant's motion on this wholly unsupported record. In its opinion, the Court inferred that the witnesses' memories may have dimmed and may not be able to be refreshed, that some witnesses may no longer be available and that it would be hard to reconstruct claimant's medical condition of six or more years previously.

This determination by the Court of Claims that prejudice had resulted to defendant because of the inferred unavailability of witnesses was erroneous not only because it was completely unsupported by the record but also because, even if it had been supported, the unavailability of witnesses is not legal prejudice which justifies invoking laches.

In determining that delay worked to defendant's prejudice, the Court of Claims apparently overlooked plaintiff's burden of proof in the matter. Except as noted below, the burden of proof in the case was upon plaintiff. If the case had gone to trial and the witnesses had either been unavailable or had no recollection of the matter, plaintiff would have been unable to prove his case. The problem of witness unavailability and recollection is a problem that is equally present and equally taxing to both sides of the case since no man, plaintiff nor defendant, is immune from the effects of the passage of time. Accordingly, both parties would be equally disadvantaged by the passage of time. Under such circumstances, there can be no prejudice to defendant since the relative positions of the parties would have remained equal in terms of witness availability and acuity. The disadvantage, if anything, would rest more heavily on plaintiff since he carried the burden of proof in the case. Thus the Court of Claims' error in finding a basis, either in fact or in law, to support a laches affirmative defense. Since this error infringed upon plaintiff's right to due process under the Fifth Amendment of the Constitution, the judgment of the Court below must be reversed.

C.

ERROR TO UPHOLD PHYSICAL EVALUATION BOARD DETERMINATION WHERE NOT SUPPORTED BY THE RECORD

In his claim below, plaintiff asserted that the Army Physical Evaluation Board was without legal or factual justification in determining that plaintiff had a 20% disability that existed prior to service. This determination was crucial to this case since, without it, plaintiff would be rated at 40% disabled and entitled to a lifetime pension of 40% of pay. With the determination, however, plaintiff was rated at a net 20% disability and entitled only to nominal severance pay.

In making this determination, the Physical Evaluation Board was governed by Army Regulation AR635-40, paragraph 1-8.1 which provided that a service member was presumed to be in sound physical condition at entry on active duty, that the presumption of sound physical condition upon entry to active service "may be overcome only by a preponderance of evidence as distinguished from personal opinion, speculation, or conjecture," and further that "in the absence of such proof by a preponderance of evidence, reasonable doubt will be resolved in favor of the member."

It was plaintiff's position in the Court of Claims that the record totally failed to support defendant's burden of proving by a preponderance of evidence that plaintiff was 20% disabled at the time he entered on active duty and further failed to overcome the mandatory presumption of sound physical condition. With respect to this and other issues raised by plaintiff, the Court of Claims held, at page 2 of its opinion, "In our view, none of these issues can properly be decided on the present administrative record." In

essence, this determination by the Court constituted a finding that the record did not support defendant's burden of proof that plaintiff was disabled prior to his entry on active duty. Since the record did not support the defendant and demonstrate that it had carried its burden of proof, the Court of Claims was required to reverse the determination as not being sustained by the evidence. The failure of the Court of Claims to do so deprived plaintiff of due process under the Fifth Amendment and requires a reversal of the order of the Court of Claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. O'CALLAGHAN,

pro se

127 North Dearborn Street
Suite 919
Chicago, Illinois 60602
(312) 332-1600

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 137-76

DECIDED: APRIL 27, 1978

JOSEPH M. O'CALLAGHAN) Military pay; military
) disability retirement
 v.) pay; laches
))
THE UNITED STATES))

Joseph M. O'Callaghan, pro se.
LeRoy Southmayd, Jr., with whom was Assistant Attorney General Barbara Allen Babcock, for defendant.

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

O R D E R

This is a suit by a former Army Captain for military disability retirement pay; it comes before us on both parties' motions for summary judgment. Oral argument has been had.

Plaintiff was commissioned a reserve second lieutenant in June 1964; shortly thereafter he obtained a delay in his call to active duty in order to attend law school. He was finally called to active duty in September 1967; prior thereto he had a physical examination, in April 1967, and was found qualified for active duty. In the Fall of 1968 and again in 1969 he appeared before Medical Evaluation

Boards each of which found some physical defects. In February 1970 a Physical Evaluation Board found him permanently unfit for service but with a substantial percentage attributable to defects existing prior to his entry into active service. He was honorably discharged in April 1970 with entitlement to severance pay but without entitlement to disability retirement pay (because his disability was rated at less than 30%). The Physical Review Council concurred in the action of the Physical Evaluation Board, as later did the Army Physical Disability Agency.

Plaintiff's application (in March 1973) to the Correction Board was rejected without a hearing in October 1973. He filed suit here on March 30, 1976.

There is one legal issue which can be decided without any consideration of factual matters. Plaintiff urges that the only lawful date for evaluation of health factors existing prior to service (EPTS) was June 1964 (when he was commissioned) and that the three-year period while he was studying law was "inactive duty for training"; defendant, on the other hand, contends that that period was at most plain-and-simple inactive duty, and that the cut-off date for any EPTS factor was 1967 when he entered into active duty. We agree with defendant that the correct reading of the statute and regulations is that plaintiff's three-year span (during which he did nothing militarily except answer military letters which happened to be sent to him) was "inactive duty," not "inactive duty for training." This seems to us the only reasonable interpretation of the controlling legislation and regulations, as applied to plaintiff's circumstances. See 37 U.S.C. § 206; AR 601-25, 135-90, 140-10, 310-25, 601-25.¹ Accordingly, we hold

¹ Plaintiff's motion to strike the affidavit of James F. Monahan is denied.

that plaintiff's entrance into active duty in 1967 is the appropriate point for determining any EPTS factor.²

Plaintiff next urges that (a) the Physical Evaluation Board and Correction Board erred in failing to rate his heart condition (he claims a 30% rating for that problem); (b) both boards erred in the percentage of disability (40%) assigned to his rheumatoid spondylitis (he claims a rating of 60%); and (c) assuming (contrary to his position) that entry on active duty is the appropriate point at which to determine an EPTS factor, both boards nevertheless erred in law and on the facts in deciding that there was a 20% EPTS for rheumatoid spondylitis (leaving a net rating of 20% for that defect) (plaintiff claims no deduction at all for an EPTS factor).

We have reviewed the administrative record, which is before us, and the parties' arguments (written and oral) on the points outlined in the preceding paragraph. Our conclusion is that we cannot decide any of those issues without a further inquiry into the facts; the legal issues embodied in those points are all entwined with factual questions which call for resolution by trial. In our view, none of those issues can properly be decided on the present administrative record without more.

The difficulty with now according plaintiff a trial is the defense of laches;³ plaintiff began this suit almost six years (5 years, 11 months, 27 days) after his claim accrued

² As implied *infra*, this holding could conceivably make a significant difference because plaintiff's physical condition may well not have been fully the same when he entered on active duty in 1967 as it was in 1964.

³ At the oral argument, plaintiff waived a trial but we would be reluctant to hold him to that waiver if we thought that laches was not applicable.

at the time he was discharged on April 2, 1970, without entitlement to disability retirement pay.⁴ Laches has been held applicable in proper instances to disability retirement cases like this. *Devine v. United States*, 208 Ct. Cl. 998 (1975); *Eurell v. United States*, 215 Ct. Cl. (Dec. 14, 1977); *McGahey v. United States*, Ct. Cl. No. 311-75 (order of Feb. 28, 1977); *Pratt v. United States*, Ct. Cl. No. 66-77 (order of Nov. 25, 1977). That defense is especially applicable to such cases where a trial must be had and a long period had elapsed since the events occurred. Witnesses' memories as to the claimant's case will undoubtedly have dimmed and may not be able to be refreshed by the contemporaneous written records; some witnesses may no longer be available; for all medical witnesses it will be hard, if possible at all, to reconstruct the claimant's medical condition of six or more years ago. See the decisions cited immediately *supra*. In that type of case the longer the delay the more certain the prejudice to defendant. *Brundage v. United States*, 205 Ct. Cl. 502, 505-06, 509-10, 510-11, 504 F.2d 1382, 1384, 1386-87, 1387 (1974), cert. denied, 421 U.S. 988 (1975). Plaintiff is a lawyer and we see no justification for the long delay (even for the delay since the Correction Board denied his application). He says that the Army failed to make certain records available to him but so far as we can tell he was not prevented from filing suit by the non-receipt of those particular documents. We reject expressly—as we have previously done by implicit holding—plaintiff's argument that we have no authority to apply laches to cases brought (no matter how barely) within the statute of limitations.

⁴ Plaintiff's claim does not fall within the "continuing claim" principle since he was never determined by any board or authority to be entitled to disability retirement pay, nor, as we have said, is it clear on the present record that he was so entitled as a matter of law.

The result is that plaintiff cannot prevail or be permitted to go further. On the existing administrative record he is not entitled to recover, and he cannot have a trial to prove his claim because laches applies to forestall a trial.

It Is Therefore Ordered And Concluded that plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted on the grounds stated *supra*. The petition is dismissed.

By The Court

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
No. 137-76

JOSEPH M. O'CALLAGHAN

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

ORDER

This case comes before the court on plaintiff's motion, filed May 15, 1978, for rehearing *en banc* pursuant to Rules 7(d) and 151(b), with reference to the order entered herein on April 27, 1978, dismissing the petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

It Is Ordered that plaintiff's said motion for rehearing, filed May 15, 1978, be and the same is denied.

By The Court
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Entered: June 23, 1978

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 137-76
(Filed October 26, 1976)

JOSEPH M. O'CALLAGHAN v. THE UNITED STATES

**ORDER DENYING PLAINTIFF'S MOTION
TO STRIKE**

1. Plaintiff's motion to strike defendant's first affirmative defense for insufficiency is denied. Such a motion is only allowed when the defense is frivolous or plainly insufficient. It is not designed to allow decision on the merits nor to provide a vehicle for decision of questions of fact. *Dunwalke Farm, Inc. v. United States*, 130 Ct. Cl. 31, 125 F. Supp. 255 (1954). Both the petition and the motion papers indicate that the defense of laches is not frivolous nor plainly insufficient in this case. Plaintiff also correctly notes in its motion that the defense of laches depends on a number of elements which are to be balanced equitably. This may most properly be determined after a trial on the merits.

The motion to strike is also not properly a vehicle for discovery of the underlying facts upon which defendant relies. To ascertain these plaintiff should more properly rely on the discovery devices and pretrial procedures available in this court.

2. The motion to strike defendant's second affirmative defense for insufficiency is likewise denied, as such defense

App. 8

is not plainly insufficient to the judgment requested on page 7 of the petition.

3. The motion to strike the third affirmative defense is also denied. The defense that plaintiff has failed to exhaust his administrative remedies raises both factual and legal issues. The factual issues cannot be resolved by denials in plaintiff's motion papers and the legal issue must at the least await determination of the facts.

Wherefore, plaintiff's motion to strike defendant's first, second and third affirmative defenses is denied.

/s/ Philip R. Miller
Philip R. Miller
Trial Judge